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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LESLIE ANN CHEN,

Appellant,

v.

SUPREME COURT OF NEW JERSEY,

Appellee.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEE SUPREME COURT OF NEW JERSEY TO DISMISS

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On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEE SUPREME COURT OF NEW JERSEY TO DISMISS

The appellee Supreme Court of New Jersey respectfully moves pursuant to Rule 16(1)(d) to dismiss this appeal on the grounds that the constitutional issues presented may be mooted or presented in a different posture upon completion of pending State proceedings. Alternatively, the appeal must be dismissed pursuant to Rule 16(1)(b) since the questions presented are so insubstantial as to obviate further argument. Finally, since appellant raises a contention as to violation of the Privileges and Immunities Clause of the Fourteenth Amend-

ment, which was not raised or expressly passed on by appellee, this Court pursuant to Rule 16(1)(b) lacks jurisdiction to consider the issue.

Counter-Statement of the Case

With the adoption of the 1947 State Constitution, the existing decentralized regulation of the legal profession in New Jersey was revamped to establish the Supreme Court of New Jersey, the State's highest appellate Court, as the exclusive regulator of the practice of law in the State.* Thus, Article VI §II par. 3 of the New Jersey Constitution provides that the Supreme Court of New Jersey,

> "shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts . . . [and] shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."

As consistently interpreted by the Supreme Court of New Jersey, this constitutional provision empowers the Court to establish and supervise the obligations and conditions as to the practice of law from admission to disbarment and in "every area in which unjust or unethical conduct might afflict the public at the hands of those admitted by the Court to the practice of the law." *American*

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* Prior to 1947, control over the admission of attorneys to the practice was fragmented with the former Supreme Court recommending and the Governor approving the licensing and admission of attorneys to practice in the State. *State* v. *Rush,* 46 N.J. 399, 411-412, 217 A.2d 441, 447 (1966).

Trial Lawyers v. *New Jersey Supreme Court,* 66 N.J. 258, 264, 330 A.2d 350, 353 (1974). See also *In the Matter of the Application of Philip J. LiVolsi,* —— N.J. ——, —— A.2d —— (1981), *State* v. *Rush, supra* at 410, 217 A.2d at 447.

In the exercise of its constitutionally delegated powers, the Supreme Court of New Jersey establishes the conditions for plenary licensure of attorneys in the State. Prior to 1969, the rules promulgated by the Supreme Court of New Jersey precluded admission to the State bar of non-domiciliaries (See N.J. Ct. R. 1:12-1) (Ra1).* Effective in 1969, however, the rule was amended to allow for the admission of attorneys residing out of state who maintained a principal law office in New Jersey (Ra3). This provision was retained in the subsequent and latest modification of the rule in 1978, requiring domiciliaries, as a condition of licensure, to henceforth establish a *bona fide* office in the State. See N.J. Ct. R. 1:21-1(a) (Ab4).

The prospect of future retention of the rule, however, remains in doubt, as a result of the Supreme Court of New Jersey's appointment in 1980 of a Committee to Evaluate Bar Admission Requirements. In addition to reviewing the adequacy of current bar examination procedures (Ra4), the Committee also has been delegated the responsibility for investigating "other matters affecting the number of attorneys admitted, such as post-admission residency requirements, the recognition to be given admission or examination in other states, and the like." (Ra6). The preliminary recommendations of the Com-

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* As used throughout Ra refers to the appendix to this motion to dismiss; Ab and Aa as used throughout refer respectively to appellant's Jurisdictional Statement and the appendix thereto.

mittee have been released (Ra12 to Ra14) with its final report, including its proposals regarding R. 1:21-1(a), anticipated to be issued in July 1981 (Ra10). Public hearings regarding the preliminary report are also scheduled to be conducted this spring.

The appellant, a domiciliary of and licensed attorney in the Commonwealth of Pennsylvania, applied for admission to the bar of the State of New Jersey on August 28, 1980. As of that date, she was employed as a member of the Territorial Law Department of Sears, Roebuck and Co. with its principal offices in St. Davids, Pennsylvania (Aa8 ¶4). Having satisfactorily completed the requirements for temporary admission to the New Jersey bar, see N.J. Ct. R. 1:24-1(c), 1:24-2(d), 1:25, 1:26 and 1:27-1(d) (Ab5 to Ab6), appellant on December 18, 1980 was issued a temporary license to practice law in New Jersey. Pursuant to N.J. Ct. R. 1:24-2(d) appellant was thereafter required to file "[p]roof of compliance" with N.J. Ct. R. 1:21-1(a): namely, domicile and establishment of a bona fide office in New Jersey, or if a non-domiciliary, the maintenance of a "principal office for the practice of law" in the State (Ab4 to Ab5). In its stead and rather than requesting through a petition for review that the Court exercise its original jurisdiction and consider the constitutionality of R. 1.21-1 (a), see *In the Matter of the Application of Philip J. LiVolsi, supra,* appellant on January 6, 1981, filed with the Supreme Court of New Jersey a petition requesting extension of time in which to comply with R. 1:24-2(d) or alternatively, waiver of the R. 1:24-2(d) requirement and issuance of a plenary license, notwithstanding her conceded failure to establish domicile or a principal place of business within the State (Aa7 to Aa10). As grounds for the granting of her petition, appellant urged that application of N.J. Ct. R. 1:24-2(d) and 1:27-1(b) and (d) was unconstitutional because the distinctions drawn between domicili-

aries and non-domiciliaries therein violated the requirements of Article IV §2 cl. 1 (The Privileges and Immunities Clause), Article I §8. cl. 3 (Commerce Clause) and the equal protection clause of the Fourteenth Amendment of the United States Constitution (Aa9).* By order dated February 5, 1981, the appellant's motion for issuance of a plenary license was denied; her motion for extension of her temporary license was granted through July 18, 1981 (Aa1).

On or about April 6, 1981, appellant filed a Notice of Appeal from this Order with this Court pursuant to 28 U.S.C. §1257(2) (Aa4). Appellees have filed the within motion to dismiss pursuant to R. 16(1)(b) and (d) on the alternative grounds that the outcome of pending State proceedings** may moot or redefine the constitutional issues

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* Appellant therein further alleged that as of December 18, 1980, she had maintained and would, if granted plenary admission, continue to maintain a "bona fide" office in Moorestown, New Jersey (Aa8 ¶5). No information regarding the regularity of her current or future attendance at the Moorestown office or additional presence in New Jersey was proffered however.

** In addition to the ongoing review *inter alia* of N.J. Ct. R. 1:21-1(a) and 1:24-2(d) by the Committee to Evaluate Bar Admission Requirements there is currently pending before the Supreme Court of New Jersey a Petition for Review of the constitutionality of R. 1:21-1(a) (*Joy Mark Sackman* v. *Supreme Court of New Jersey*, Docket No. 18,361) in which the identical constitutional issues presented herein as well as others are posed (see Ra8 to Ra9). The Attorney General of New Jersey has urged the Court to grant review of the petition (Ra10). If, as anticipated, review is granted by the Supreme Court of New Jersey, appellant herein would have standing to move to intervene in those proceedings and to seek a further extension of her temporary license pending completion of the Court's review of the constitutionality of R. 1:21-1(a).

and because the constitutional questions posed are of insufficient merit to warrant plenary argument before the Court. Additionally, pursuant to R. 16(1)(b), appellee contends that this appeal should be dismissed to the extent that it raises the issue of violation of the Privileges and Immunities Clause of the Fourteenth Amendment (Ab4), a contention never raised or expressly passed on below (see Aa9).

ARGUMENT

The challenge raised as to requirements imposed upon non-residents practicing law in the State of New Jersey are prematurely presented in light of pending review of these requirements by the Supreme Court of New Jersey and are otherwise not of constitutional significance so as to warrant plenary review.

As the exclusive regulator of the practice of law in the State of New Jersey, the Supreme Court of that State, appellee herein, has repeatedly recognized its responsibilities among others to maintain public confidence in the judicial system. See *In the Matter of the Application of Philip J. LiVolsi, supra.* The "constitutional reposition" of this power in that Court thus mandates its "full and responsible use", "never from a myopic viewpoint, but fully and truly in the public interest." *American Trial Lawyers* v. *N.J. Supreme Court, supra,* 66 N.J. at 263, 330 A.2d at 353. Where valid questions thus arise as to the continued need or viability of its rules or their validity, the Supreme Court of New Jersey has unhesitatingly undertaken an examination of the challenged policies. See *In the Matter of the Application of Philip J. LiVolsi, supra* (review of constitutionality and desirability of Fee Arbitration Committees, N.J. Ct. R. 1:20A-1 *et seq.,* requiring arbitration of

attorney fee disputes upon a client's request (whether the lawyer consents or not) or upon a lawyer's request if the client consents; constitutionality of procedures upheld; need for amendment of rules to provide for limited right of appeal acknowledged); *American Trial Lawyers* v. *N.J. Supreme Court, supra* (constitutionality of rule establishing graduated schedule of maximum contingent fees for tort litigation upheld); *In re NBC,* 64 N.J. 476, 317 A.2d 695 (1974) (Canon of Judicial Ethics barring courtroom sketching during court sessions or recesses modified). As that Court has recognized:

> "Our rules are never immutable. Applications for their review are never foreclosed [for] . . . [t]he Court does not adopt its rules to promote or brook injustice, but, as best it can, to secure justice . . ." *American Trial Lawyers* v. *N.J. Supreme Court, supra,* 66 N.J. at 267, 330 A.2d at 355.

In conformity with this policy, the Supreme Court of New Jersey has undertaken a review of the adequacy and appropriateness of its admission policies, including the provisions of its rules challenged herein (Ra4 to Ra7). Public hearings regarding the recently released preliminary report of its Committee to Evaluate Bar Admission Requirements will be held this spring with final issuance of the Committee's recommendations scheduled for July 1981. Additionally, it is likely that the Supreme Court of New Jersey will exercise its original jurisdiction, as has been urged by the Attorney General of New Jersey, and consider as an issue of first impression the constitutionality of R. 1:21-1(a) in the context of a petition for review even more comprehensive in its challenges than the appeal herein. See *Sackman* v. *Supreme Court of New Jersey,* Docket No. 18,361 (Ra8 to Ra9).*

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* As noted previously, opportunity exists for appellant herein to move to intervene in that proceeding.

Under such circumstances where the desirability, scope and constitutionality of the rule challenged herein will in all likelihood be reviewed by the Supreme Court of New Jersey, this Court's plenary consideration of the pending constitutional challenge at this time is premature and unwarranted. As has been often recognized by this Court, the states have a "compelling interest in the practice of professions within their boundaries . . . [with] broad power to establish standards for licensing practitioners and regulating the practice of professions." The states' interests in the regulation of lawyers however is "especially great since lawyers are essential to the primary governmental function of administering justice, . . ." *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 792 (1975). See also *Leis* v. *Flynt,* 439 U.S. 438, 442 (1979); *Ohralik* v. *Ohio State Bar Ass'n,* 436 U.S. 447, 460-462 (1978). Federal review of disputes between the regulators of the bar and attorneys is thus properly viewed as an "extremely delicate . . ." process. See *American Trial Lawyers Association, New Jersey Branch* v. *New Jersey Supreme Court,* 409 U.S. 467, 468 (1973). See also *Moore* v. *Sims,* 442 U.S. 415, 423 (1979). Moreover, in instances where the State law challenged might be subject to varying interpretations, which conceivably could moot or modify the federal constitutional issues and the law has not been construed by the State courts, review in the first instance by the State courts has been deemed warranted in order to avoid "the friction of a premature constitutional adjudication . . ." *Railroad Commission* v. *Pullman Co.,* 312 U.S. 496, 500 (1941). See also *Moore* v. *Sims, supra* at 427-430; *Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U.S. 25 (1959).

Indisputedly, application of these principles of judicial economy and comity warrant deferral to the Supreme Court of New Jersey. Where as here the State has a

vital interest in consideration of the necessity for and validity of its bar admission practices, the State law challenged is not unambiguous as to its intent, has never been interpreted by the Supreme Court of New Jersey and an immediate opportunity for consideration of the pending constitutional challenge exists, consideration by this Court of the federal constitutional questions would be both a premature and an unwise interference with a matter of primary State concern. See *Moore* v. *Sims, supra,* at 429-430. Accordingly, appellee's motion to dismiss the pending appeal should be granted.

Yet even if the constitutional challenge to R. 1:21-1(a) is not premature and deference to appellee is deemed unwarranted, the issues presented are of insufficient merit to warrant plenary consideration of the appeal.*

Contrary to appellant's contentions, the right to practice law in the State courts is neither a privilege nor immunity of State or United States citizenship nor a right otherwise independently created by federal law. *Leis* v. *Flynt, supra* at 442 n.4, 443; *Silverman* v. *Browning,* 414 F.Supp. 80 (D. Conn.), aff'd 429 U.S. 876 (1976); *Norfolk and Western R. Co.* v. *Beatty,* 400 F.Supp. 234 (S.D. Ill.) aff'd 423 U.S. 1009 (1975); *Brown* v. *Supreme Court of Virginia,* 359 F.Supp. 549 (E.D. Va.) aff'd 414 U.S. 1034 (1973); *In re Lockwood,* 154 U.S. 116, 117 (1894); *Bradwell* v. *The State,* 16 Wall. 130, 139 (1872). Likewise, the fact of admission to the bar of one State does not establish any corresponding right to practice in a

* Additionally, as noted *supra,* the challenge raised as to violation of the Privileges and Immunities Clause of the Fourteenth Amendment, which was neither raised nor expressly passed on below, is improperly presented herein. See *Picard* v. *Connor,* 404 U.S. 270, 278 (1971).

sister state. *Leis* v. *Flynt, supra* at 443. Rather, as has been repeatedly recognized by this Court, any right to practice the legal profession is a matter exclusively one of State law origin and control subject only to the requirement that the State not exercise its power in an arbitrary or discriminatory manner or in a way contemplated to deny First Amendment freedoms. *Id.* at 442; *Konigsberg* v. *State Bar of California,* 353 U.S. 252, 273 (1957).

In this regard, this Court has upheld numerous restrictions imposed upon nonresidents seeking to practice law in a sister state. Thus, in *Martin* v. *Davis,* 187 Kan. 473, 357 P.2d 782 (S.Ct. 1960) app. dis. *sub nom. Martin* v. *Walton,* 368 U.S. 25 (1961) this Court dismissed for want of a substantial federal question a challenge under the equal protection clause to a Kansas statute and rules of court requiring that an attorney admitted to the Kansas bar but who also was admitted and regularly engaged in the practice of law in another State only be allowed to practice before Kansas courts and administrative agencies if he had the association of a Kansas lawyer. In upholding the constitutionality of the requirement, this Court acknowledged the validity of five factors cited by the Kansas Supreme Court as underlying the restriction: 1) provision to Kansas citizens of the service of a resident attorney familiar with local rules and procedure and upon whom service could be made; 2) difficulties encountered by Kansas Courts and commissions in obtaining the presence of attorneys from Missouri; 3) inability of Kansas-officed attorneys to effectuate service on Missouri-officed Kansas attorneys; 4) refusal of some Missouri-officed Kansas attorneys to answer emergency calls; and 5) failure of Missouri officed Kansas attorneys to familiarize themselves with Kansas rules of procedure and practice. 368 U.S. at 27-28. Notwithstanding the fact that the

appellant, a Missouri attorney practicing across the Kansas border, was a resident of and maintained a general practice in Kansas and was familiar with local Kansas rules and procedure, this Court concluded that the challenged Kansas requirement as explicated by the Kansas Supreme Court constituted permissible regulation of out-of-State attorneys. The fact therefore of possible "incidental individual inequality" as applied to Mr. Martin was in this Court's view insufficient to warrant invalidation. 368 U.S. at 26.

Again in *Brown* v. *Supreme Court of Virginia,* 359 F.Supp. 549 (E.D. Va.) (three judge court) aff'd 414 U.S. 1034 (1973) and cited with approval in *Leis* v. *Flynt, supra,* substantial deference was accorded to the Virginia Commonwealth's Court's views as to the best means available for creating a corps of competent attorneys. There, a Court rule had been promulgated requiring that out of State attorneys seeking admission to the Virginia bar through reciprocity be permanent residents of Virginia and intend to practice full time in Virginia. In contrast, attorneys who had passed the Virginia bar exam were not required to maintain Virginia residency or maintain a full time practice in the State. Notwithstanding the plaintiffs' contention that the Rule was anticompetitive and discriminatory and solely promulgated to benefit State attorneys practicing full time in Virginia, the rule was upheld as a compelling and reasonable requirement to ensure a "responsible bar [to]" full time service to the public and the proper administration of justice. 359 F.Supp. at 555, 557, 559-560, 561-562.

A State's strong interest in demanding a substantial commitment to the practice of law in that State alone has also resulted in this Court's rejection of various con-

stitutional challenges to post-admission residency requirements. See *Wilson* v. *Wilson,* 416 F.Supp. 984 (D. Ore. 1976) aff'd 430 U.S. 925 (1977) (upholding Oregon requirement of State residency at time of admission to bar in face of equal protection and due process challenge); *In re Drociak,* Docket No. 80-806, 49 U.S.L.W. 3514 (January 19, 1981) app. dis. *cert.* denied (exclusion from New Hampshire bar because of lack of residency challenged as violation of Privileges and Immunities clause and denial of equal protection and due process); *Cf.* also *McCarthy* v. *Philadelphia Civil Service Commission,* 424 U.S. 645 (1976) (Philadelphia residence requirement for city employees upheld as rational requirement for purposes of due process and equal protection clause and not to effect an impairment of right of interstate travel) *Sununu,* v. *Stark,* 383 F.Supp. 1287 (D. N.H. 1974) (three judge court) aff'd 420 U.S. 958 (1975) (upholding seven year residency requirement for Senate candidates); *Chimento* v. *Stark,* 353 F.Supp. 1211 (D. N.H.) (three judge court) aff'd 414 U.S. 802 (1973) (upholding seven year residency requirements for gubernatorial candidates). And see *Deason* v. *United States District Court for the District of New Mexico,* 574 F.2d 504 (10th Cir.) *cert.* denied 439 U.S. 866 (1978) (Federal District Court residency requirement upheld as not violative of right to interstate travel); *Aronson* v. *Ambrose,* 479 F.2d 75 (3rd Cir.) *cert.* denied 414 U.S. 854 (1973) (Virgin Island District Court Rule imposing pre and post-bar admission residency requirement upheld). See also *Hawkins* v. *Moss,* 503 F.2d 1171 (4th Cir. 1974) *cert.* denied 420 U.S. 928 (1975) (refusal of South Carolina to grant admission as a matter of reciprocity to New Jersey lawyer because of New Jersey's nonreciprocity policy upheld as not con-

stituting denial of equal protection or privileges and immunities).*

The New Jersey Court Rule for similar reasons must be viewed as grounded upon reasonable, if not compelling, factors warranting denial of the privilege of practice in the State courts to non-residents such as appellant who have failed to demonstrate any intent to maintain sub-

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* In this regard, the reference by Mr. Justice Washington sitting as Circuit Justice in *Corfield* v. *Coryell,* 6 F. Cas. 546, 552 (C.C. E.D. Pa. 1825) to the State's inability pursuant to the Privileges and Immunities Clause to interfere with the "right of a citizen of one State to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; . . .," see also *Baldwin* v. *Montana Fish and Game Comm'n,* 436 U.S. 371, 384 (1978), is improperly read, see e.g. *Sheley* v. *Alaska Bar Association,* 620 P.2d 640 (Alas. S.Ct. 1980) as precluding imposition of differing requirements for bar admission as between residents and non-residents. See *Hawkins* v. *Moss, supra* at 1178-1180. It should be further noted that the opinion issued in *Jensen* v. *Murphy,* Civil No. HM80-608 (D. Md. 1980) and relied upon by appellant herein in this contention is without any precedental value since it has been withdrawn. Furthermore, appellant's reliance upon *Gordon* v. *Committee on Character and Fitness,* 48 N.Y.2d 266, 397 N.E.2d 1309 (Ct. App. 1979) in support of its privileges and immunities and commerce clause arguments is misplaced. Even assuming the correctness of that ruling in view of *Leis* v. *Flynt, supra,* the New York Court of Appeal decision as to the unconstitutionality of a six month preadmission durational residency requirement provides scant assistance in evaluating New Jersey's post-admission substantial contact requirement. Equally unpersuasive in the context of State regulation of the legal profession and as to the particular requirement challenged herein is the decision in *Underhill Associates Inc.* v. *Coleman,* 504 F.Supp. 1147 (E.D. Va. 1981), invalidating a Virginia statute regulating out of state security brokers.

stantial contacts with the State.* Thus, while persons such as appellant have demonstrated through the admissions process a threshold knowledge of New Jersey law, their non-residency and insubstantial professional presence in the State does not guarantee or suggest any future commitment to continue to keep abreast of developments in New Jersey law and practice. See *Brown* v. *Supreme Court of Virginia, supra,* 359 F.Supp. at 561. To the contrary, however, the Supreme Court of New Jersey could presume that those residents of the State, although practicing in other states, would be exposed and would maintain a greater familiarity with developments in State law and practice. Similarly, it would follow that the courts' and clients' opportunity and ability to contact personally lawyers residing in New Jersey would be greater than those attorneys such as appellants whose presence in the State is unpredictable if not non-existent. Moreover, it could reasonably be determined that

> "[t]he high ethical standards of an attorney can best be maintained after practice begins if all members of the bar have a stake in the community. Lawyers are frequently leaders in the community and a resident attorney will have a continuing interest in the

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* In adopting the "principal office for the practice of law" requirements for non-domiciliaries, the Supreme Court of New Jersey obviously intended to employ a flexible test to evaluate the extent and adequacy of the non-domiciliary's contact with New Jersey. The liberality of the Court's interpretation of this requirement however is unknown. The lack of any State court application of the rule to a particular fact pattern to guide this Court is compounded by the absence herein of any facts regarding the extent of appellant's professional contact with the New Jersey courts or residents. What is presented is merely appellant's conclusions that she maintains a "bona fide" but not "principal office" in the State.

> success of local society and the quality of community life by reason of the fact that his family generally resides in the area. Moreover, the residence reinforces the attorney's interest in his reputation, . . . [t]here are attorneys admitted to practice who sometimes are subject to rather dubious ethical acts, and a resident attorney may be confronted with informal community sanctions which may be effective even though formal sanctions are not taken. While it is acknowledged that an attorney may reside and work in separate locales within the state, the vast majority of the attorneys are an integral part of the community wherein they maintain an office. *Brown* v. *Supreme Court of Virginia, supra*, 359 F.Supp. at 561.

A substantial nexus therefore exists between the competency and responsibility of a bar and the principal legal office requirement imposed as a condition of plenary admission of nonresidents to the New Jersey bar.

The State's broad discretion in regulating the legal profession necessarily extends to existing problems or concerns or those it believes likely to result. See *In re Primus*, 436 U.S. 412, 438-439 (1978). Similarly, the propriety of its regulation of the legal profession in order to protect the public interest must be measured by the overall application and not individual inequalities resulting from the adopted classification. See *Martin* v. *Walton, supra*. Since the challenged New Jersey rule draws reasonable distinctions among classes of attorneys with differing contacts with the State and advances substantial legitimate interests of the State in creation of a competent and responsible bar, appellant's equal protection challenge must be viewed as without merit.

Nor, as appellant maintains, does the rule effect an impermissible burden on interstate commerce. It is, of course,

firmly established that notwithstanding the affirmative grant of authority to Congress as to interstate commerce, the states retain "broad power" to legislate in matters of local concern pursuant to reserved Tenth Amendment powers even if interstate commerce is incidentally and significantly affected. See e.g. *H.P. Hood & Sons* v. *Dummond,* 336 U.S. 525, 531-532 (1949). As stated in *Pike* v. *Bruce Church,* 397 U.S. 137, 142 (1970) and reaffirmed in *Hughes* v. *Oklahoma,* 441 U.S. 322, 331 (1979), "Where the challenged law regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . ." Here, the Supreme Court of New Jersey's bar admission rules are uniformly applicable to all applicants. Both New Jersey residents and out-of-state applicants once they have satisfied bar examination and character requirements are presented with identical alternatives, either: 1) maintain or establish residency and thereafter establish a bona fide law office in New Jersey; or 2) if domicile in New Jersey will not be maintained or established, establish a principal law office in the State. And as noted previously, the underlying basis for the requirement—substantial contact in the State—is obviously a legitimate goal to require of the State's attorneys. Consequently, even assuming that the requirement as applied to attorneys who chose to reside out of state imposes some burden upon interstate commerce that burden may not be viewed as excessive nor without resulting substantial benefit to legitimate State concerns. Appellant's claims of undue burden upon interstate commerce must therefore fail.

In sum, the Court's review of this appeal is unwarranted prior to completion of pending proceedings before the Supreme Court of New Jersey where the constitutionality

and desirability of continued enforcement of the challenged rule are likely to be considered. Additionally, since the federal constitutional questions raised herein are without substantial merit or otherwise improperly raised in the first instance herein, the appeal should be dismissed.

CONCLUSION

For the above stated reasons, this appeal should be dismissed as the constitutional challenge should not be considered by the Court in advance of pending State court proceedings or alternatively because the constitutional questions presented lack of sufficient merit to warrant plenary review. Additionally, this Court lacks jurisdiction to consider the contention as to violation of the Privileges and Immunities Clause of the Fourteenth Amendment since that argument was not properly raised or expressly passed upon below.

Respectfully submitted,

JAMES R. ZAZZALI,
Attorney General of New Jersey,
Attorney for Appellee, Supreme Court of New Jersey,
By: ANDREA M. SILKOWITZ,
Deputy Attorney General.

[APPENDICES FOLLOW]

APPENDIX A

New Jersey Supreme Court Rules 1:12-1 and 1:21

SUPREME COURT RULES 1:12-1

(1968)

CHAPTER V. PRACTICE OF LAW, ATTORNEYS AND COUNSELLORS; CERTIFICATES OF ADMISSION

RULE 1:12. PRACTICE OF LAW; ATTORNEYS AND COUNSELLORS

1:12-1. Practice of Law; Appearances in Court

(a) No person shall practice law in this State, except as provided in paragraph (c) of this rule, unless

(1) he has been admitted to practice as an attorney at law of this State and is in good standing; and

(2) he is domiciled in this State; and

(3) he has fulfilled the requirements of Rule 1:20-7 and has been issued a certificate of plenary admission to the bar.

(b) No attorney admitted to practice in this State shall permit another person to practice in this State in his name or as his partner, employee or associate unless such other person satisfies the requirements of paragraph (a) of this rule or is his duly registered law clerk practicing pursuant to Rule 1:12-8A.

(c) No person shall be permitted to appear to prosecute or defend an action in any court of this State unless:

(1) he satisfies the requirements of paragraph (a) of this rule, or

(2) he is a party to the action, or is the guardian of a party to the action; or

(3) he has been admitted to speak, pro hac vice, pursuant to Rule 1:12-8; or

(4) he is a law clerk, law school student or law school graduate practicing within the limits prescribed by Rule 1:12-8A.

(d) Any person appearing in any action shall be under the control of the court in which he appears.

(e) A corporation shall not practice law in this State, nor shall it appear or file any paper in any cause in any court of this State except through an attorney authorized by paragraph (a) of this rule to practice in this State.

(f) The fact that an agent or employee of an individual, or an officer, trustee, director, agent or employee of a corporation shall be an attorney authorized to practice in this State shall not be held to entitle said individual or corporation to do any act prohibited by these rules.

Note: Effective September 9, 1953; paragraph (a) amended June 28, 1954 to be effective September 8, 1954; amended May 11, 1959 and July 20, 1959 to be effective September 9, 1959; paragraph (c) amended August 13, 1964 to be effective September 9, 1964. Formerly Rule 1:8-21.

Appendix A

Chapter III. Practice of Law and Admission to Practice

Rule 1:21. Practice of Law (1969)

1:21-1., Who May Practice; Appearance in Court

(a) Qualifications. No person shall practice law in this State unless he is an attorney, holding a plenary license to practice in this State, is in good standing, and is either domiciled in this State or maintains in this State his principal office for the practice of law; provided, however, that a person shall be permitted to appear and prosecute or defend an action in any court of this State if he (1) is a real party in interest to the action or the guardian of the party; or (2) has been admitted to speak pro hac vice pursuant to R. 1:21-2; or (3) is an attorney holding a certificate of limited admission, a law clerk or a law student or law graduate practicing within the limits of R. 1:21-3. No attorney authorized to practice in this State shall permit another person to practice in this State in his name or as his partner, employee or associate unless such other person satisfies the requirements of this rule.

APPENDIX B

News Release, dated May 15, 1980

ADMINISTRATIVE OFFICE OF THE COURTS
STATE OF NEW JERSEY

Robert D. Lipscher
Administrative Director
of the Courts
Judicial Information Services

State House Annex
Trenton
New Jersey
08625
609 292-9580

May 15, 1980

FOR IMMEDIATE RELEASE

Chief Justice Robert N. Wilentz announced today that the Supreme Court would shortly name a Committee to Evaluate Bar Admission Requirements. The Chief Justice indicated that, although the Board of Bar Examiners had already begun a study of the bar examination based on the February 1979 examination as part of the Board's periodic assessment of the process, the Court's concern over the declining pass rate, along with the public comments generated by the results of the July 1979 bar examination, suggested that an in-depth analysis of the entire bar examination procedure be conducted. Members of the Committee will include former and present members of the Board of Bar Examiners, together with members of the bar and others.

Appendix B

The basic task of the Committee will be to determine whether the present bar examination procedures adequately fulfill their dual goals of assuring that only those qualified to practice law pass the bar examination and, at the same time, that none who are indeed qualified fail. The Committee will be asked to recommend any changes it deems desirable in the examination and related procedures.

The Chief Justice said:

"The Supreme Court has noted recent comments made about the decline in the percentage of those who pass the bar. Those comments suggest a deep concern as to whether the bar examination is properly fulfilling its role in the admission process or whether it is unjustifiably preventing some qualified candidates from becoming lawyers. We share those concerns. Further, we agree that the matter needs thorough study. For that purpose and in the exercise of our constitutional responsibility over admissions to the bar, the Court will soon appoint a Committee to examine every aspect of the bar admission process including some of its underlying assumptions.

"In a general sense, the most important function of this Committee will be to determine whether the examination as presently designed provides an acceptable standard for determining who shall, and who shall not, be admitted to the practice of law. More specifically, the essay portion of the examination will be reviewed to determine, for example, whether it is too complex, as some have asserted, or whether the number of questions should be changed. The Multi-State Bar Examination (MBE), a uniform multiple choice examination administered throughout the country, will be evaluated. A question to be addressed relating to the MBE is whether the automatic passing grade for New Jersey is too high.

Appendix B

"The Committee will be asked to define as precisely as possible—and the Court realizes this is most difficult—the standard of competence which the examination ought to measure and the extent to which it achieves that purpose. In all of these matters the Committee will be asked to look at the experience of other states, especially those which have recently studied admission procedures.

"We will also ask the Committee to express its views on the concern expressed by some that perhaps the bar examination is unjustifiably limiting the number of attorneys in New Jersey, contributing both to the unavailability and high cost of legal services. This is obviously an extremely complicated question involving, as it does, the relationship between appropriate standards for admission to the bar and the number of attorneys available to the public. The Committee will have to consider and report to the Court on such fundamental issues as whether the need, if any, for more attorneys is so pressing that the standards for admission should be lowered and whether such a lowering of standards will necessarily result in the admission of attorneys not otherwise qualified to practice in this State.

"The Committee will also be asked to look into the training of bar candidates to determine whether changes in training, in and out of law school, are called for, either separate from, or in conjunction with, changes in the bar examination. Furthermore, the Committee will report on other matters affecting the number of attorneys admitted, such as post-admission residency requirements, the recognition to be given admission or examination in other states, and the like. In connection with all of the foregoing, the Committee will be able to retain outside consultants to assist it, where appropriate.

Appendix B

"The Court has examined at length many of the questions raised subsequent to the announcement of the results of the July 1979 bar examination. We have received a great deal of information from the Board of Bar Examiners and have met with them as well as with others, including former bar examiners, deans of law schools, the Attorney General and other individuals, all of whom are deeply interested in these matters. Based on all of those meetings, as well as the analysis of the information that has been provided to the Court through its Clerk's Office and the Administrative Office of the Courts, the Court is convinced that there is not only sufficient cause but a real necessity to undertake the kind of study about to be initiated.

"There is absolutely no doubt on the part of the Court that the present Board of Bar Examiners has conscientiously upheld the high standards that have characterized the New Jersey Board for many years. It has been one of the most highly regarded Boards in the country. It is clear to the Court that the Board has consciously continued its efforts to design and grade the examination on a totally objective basis without regard to any arbitrary pass rate. The Board's sole motivation has, in fact, been to ensure that no one will be allowed to practice law in New Jersey who is not qualified to do so.

"Accordingly, the Court's decision to form this Committee cannot be taken as any implication of lack of confidence in this extremely competent, hard-working Board. Rather, it reflects our belief that no institution, no matter how well intentioned, is perfect and that when legitimate questions are raised, they should be investigated and answered with a completely open mind."

APPENDIX C

Notice of Petition to the Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY

DOCKET No. 18,361

CIVIL ACTION

JAY MARK SACKMAN,

Petitioner,

v.

SUPREME COURT OF NEW JERSEY, *et al.*,

Respondents.

To: JAMES R. ZAZZALI
Attorney General of New Jersey
Attorney for Respondents

Attention: RICHARD M. HLUCHAN
Deputy Attorney General
36 W. State Street
Trenton, New Jersey 08625

SIR:

NOTICE IS HEREBY GIVEN that Petitioner, Jay Mark Sackman, has filed a Petition with the Supreme Court of New Jersey *to* review the constitutionality of R. 1:21-1(a) and for such other relief as is set forth in such Petition, a copy

of which was filed and was served upon you on March 18, 1981.

CLAPP & EISENBERG
A Professional Corporation
Attorney for Petitioner
By: STUART L. PACHMAN

Dated: April 1, 1981.

Of Counsel:

Pryor, Cashman, Sherman & Flynn
New York, New York

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the within Notice of Petition to be sent to Richard M. Hluchan, Deputy Attorney General, Attorney for Respondents, addressed to 36 West State Street, Trenton, New Jersey 08625, by first class United States prepaid mail on April 1, 1981.

STUART L. PACHMAN

Dated: April 1, 1981.

EXHIBIT D

Response to Petition Filed in the Supreme Court of New Jersey

292-8576

April 24, 1981

Stephen W. Townsend, Esq.
Clerk, Supreme Court of New Jersey
State House Annex
Trenton, New Jersey 08625

Re: Sackman v. Supreme Court of New Jersey
Docket No. 18,361

Dear Mr. Townsend:

Pursuant to R. 2:6-2(b), please accept this response to the "Petition to Declare R. 1:21-1(a) Unconstitutional and Unenforceable and for its Rescission or Modification" filed in this matter. Because this matter involves a constitutional callenge to a rule adopted by the Supreme Court of New Jersey, the Attorney General agrees that it is appropriate for the Court to directly hear the petitioner's claim. Accordingly, it is submitted that the Court should grant certification of this matter and set a briefing schedule which will allow the parties adequate time to set forth their positions on the merits. See *In Re LiVolsi,* —— N.J. —— (1981).

It is my understanding that a committee chaired by Justice Jacobs is currently considering proposals to amend various Court rules, including R. 1:21-1(a), and that the committee's report will be filed by the end of July. Since the Court and the parties would obviously wish to have

the benefit of this report in considering this matter, it would appear reasonable to consider the date of availability of the anticipated report in fixing a briefing schedule.

JAMES R. ZAZZALI
Attorney General of New Jersey
Richard M. Hluchan
Deputy Attorney General

RMH:mmb

cc: Stuart L. Pachman, Esq.

APPENDIX E

Excerpt from Interim Report of the Supreme Court Committee to Evaluate Bar Admission Requirements, dated May 6, 1981 (pp 69-72)

E. Residency Requirements

23. *R.* 1:21-1(a) States that "[N]o Person Shall Practice Law in this State Unless he is . . . Either Domiciled and Maintains a Bona Fide Office for the Practice of Law in this State or, if Not Domiciled in this State, Maintains in this State His Principal Office for the Practice of Law." The Basic Residency and Office Requirements Set Forth in this Rule Should be Retained.

a. *R.* 1:21-1 Should be Amended to Include the Following Definition of "Bona Fide Office":

> Bona Fide Office. For the Purpose of this Rule, a Bona Fide Office is a Place Where the Attorney or a Responsible Person Acting on his Behalf can be Reached in Person and by Telephone During Normal Business Hours. A Bona Fide Office is More than a Mail Drop, a Summer Home Which is Unattended During a Substantial Portion of the Year, or an Answering Service Unrelated to a Place Where Business is Conducted.

Commentary: Currently, all but 11 states and the District of Columbia have some type of residency requirement as a condition to practicing in their jurisdictions. The Committee believes that New Jersey's requirement of either a domicile and bona fide law office or a principal office for *of Law Examiners*, 42 *F.Supp.* 1082 (D. Md. 1979); *Suff-*

the practice of law, as set forth in *R.* 1:21-1(a), should be retained. These requirements are reasonable means to ensure that attorneys practicing in New Jersey remain accountable to authorities in this State, and readily accessible to opposing counsel and to their clients. The rules also tend to ensure that attorneys who practice in New Jersey are familiar with local custom as well as recent developments in local law.

Recent cases have held that requiring a candidate to maintain a residence in a state for a period of time prior to admission to the state's bar is unconstitutional. *Gordon* v. *Committee on Character and Fitness,* 48 *N.Y.*2d 266, 397 *N.E.*2d 1309 (1979) (rule requiring that applicant be a resident for six months immediately preceding the submission of his application for admission to practice violates privileges and immunities clause of *U.S. Const.,* Art. IV, §2, cl. 1); *Sheley* v. *Alaska Bar Assn.,* 620 *P.*2d 640 (Alaska Supreme Court 1980) (rule requiring applicants to be domiciled in state for at least 30 days prior to taking bar examination violates privileges and immunities clause of *U.S. Const.,* Art. IV, §2, cl. 1); *contra, Golden* v. *State Board of Law Examiners,* 452 *F.Supp.* 1082 (D. Md. 1979); *Suffling* v. *Bondurant,* 335 *F.Supp.* 257 (D. N.M. 1972), aff'd *mem. sub nom., Rose* v. *Bondurant,* 409 *U.S.* 1020 (1972). Unlike the rules which were held unconstitutional, New Jersey's rules do not require residency at all and do not force a candidate residing in another state to move to New Jersey before being able to practice in this State. The rules are reasonable means to achieve important objectives and should be able to withstand constitutional challenge.

a. The Committee believes that the "bona fide office" requirement in *R.* 1:21-1 is subject to abuse, and that certain

minimal standards for satisfying the requirement should be made part of the rule. The proposed amendment submitted by the State Bar Association to the Chief Justice would be suitable for this purpose.

b. The phrase "his principal office" implies that an attorney can only have one principal office. In a situation where an attorney divides his time and energy between offices in two states, deciding which is his principal office can lead to a rather arbitrary determination.

The number of hours he spends at each office, the number of clients serviced at each office and the amount of income derived from each office could be used as guidelines in making this determination. However, an office which satisfies one or all of these criteria might be no better equipped to handle a New Jersey case than an office which technically does not meet such guidelines.

Instead, the Committee recommends that the principal office rule be applied flexibly so that an attorney who practices out of offices in New Jersey and in another state be deemed to have satisfied the requirement, as long as his practice in New Jercey is not subordinated to his practice in another state.

The Committee considered recommending the modification of the principal office requirement to a substantial office requirement. However, a substantial office could be interpreted as a place where an attorney spends as little as several days a month. Such a practice would be clearly secondary to the attorney's out-of-state practice, and might not adequately serve the policies previously discussed.